IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
MARCH 2000 SESSION

STATE OF TENNESSEE v. RICHARD LYNN NORTON

Direct Appeal from the Criminal Court for Greene County
No. 97-CR-443 James E. Beckner, Judge

No. E1999-00878-CCA-R3-CD - Decided
August 22, 2000

The defendant, Richard Lynn Norton, was convicted on three counts of the sale or delivery of crack cocaine in an amount exceeding 0.5 grams, Class B felonies. See Tenn. Code Ann. § 39-17-417(a)(2)-(3), (c)(1). The trial court imposed consecutive sentences of 12 years in the Department of Correction on each count, for an effective sentence of 36 years. Fines totaled $6,000. On appeal, the defendant argues that the convicting evidence was insufficient and that the sentence was excessive. Because the evidence is sufficient, the judgment is affirmed. The effective sentence is modified from 36 years to 24 years.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed as Modified.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Gerald L. Gulley, Jr., Knoxville, Tennessee (on appeal), and Gerald T. Eidson, Rogersville, Tennessee (at trial), for the appellant, Richard Lynn Norton.

Paul G. Summers, Attorney General and Reporter, Mark A. Fulks, Assistant Attorney General, and Eric D. Christiansen, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant's convictions stem from three controlled buys arranged by the Third Judicial District Drug Task Force. On December 22, 1996, a confidential informant, Penny Knight, was paged by the defendant, who offered to sell her crack cocaine. Ms. Knight arranged to meet the defendant and his co-defendant, Robin Willett Key, in the parking lot of the Food Country Supermarket in Mosheim, Tennessee, at 3:00 P.M. on the following day. Prior to the meeting, Greene County Sheriff's Deputy Doug Johnson and his partner, Tim Ward, wired Ms. Knight for sound and insured that she had no illegal drugs either in her possession or in her vehicle. The officers gave her $300 in cash and, while parked in their vehicle across the street from the transaction, monitored the exchange via the wire. The defendant and co-defendant Key were together when they arrived at the Food Country parking lot. Ms. Key was driving and the defendant

was seated in the passenger seat. The officers observed Ms. Knight approach the passenger side of the vehicle in which the defendant was riding, make conversation with the occupants, place her hands inside the car, and then leave. After the exchange, Ms. Knight returned to the officers and provided them with one gram of cocaine, the remainder of the cash they had given her, and the sound equipment.

Both an audio tape and a transcript of the December 23 transaction were introduced at the defendant's trial. They established the following conversation to have taken place:

Ms. Knight: Damn, Lynn, when we say three o'clock, we mean three o'clock.

Defendant: I know, but I had car trouble.

Ms. Knight: Damn, where'd you get this thing at?

Defendant: This is mine.

Ms. Knight: Listen, on that weight, that weight was a little bit shy last time. My man didn't like that.

Defendant: Well, it's just, it's five rocks. That's what I get for that much money. It ain't no big old rock.

Ms. Knight: Well, what do they look like today?

Defendant: It's light today.

Ms. Knight: Well, do you buy it like that, or you move it?

Defendant: They weight it. No, I don't buy it, I have to go all the way to Knoxville to get it.

Ms. Knight: Okay. Well, at least you're a little bit straighter than you was last time.

Defendant: Yeah.

Ms. Knight: What are you doing, Miss Rhonda?

Defendant: That's uh, real good right there, that's a lot better than that last.

Ms. Knight: Messed up?

Defendant: That's that– that's that–

Ms. Knight: What's your last name? I was trying to think of what it was.

Unknown: Uh, Willett.

Ms. Knight: Willett? Okay, kept saying Cain. I was– I was trying to think Cain. Carly's your sister, right?

Willett (Key): Yeah, yeah.

Ms. Knight: Okay. Well, let's go take this and deliver it.

Defendant: Better get that . . . .

Ms. Knight: Yeah. See you. Gotta go. Y'all be good.

Eight days after the first purchase, the defendant and Ms. Key met Ms. Knight again at the same parking lot. This time, Ms. Knight purchased 1.4 grams of crack cocaine. A video tape and a transcript of that purchase were introduced at trial, but were not included in the record. Ms. Knight testified that the second transaction occurred in the same manner as the first. She stated that she was paged by the defendant, who offered to sell her crack cocaine. She was wired and searched before arriving at the parking lot to meet the defendant, who was in the passenger seat of a car driven by Ms. Key. She approached the defendant and then exchanged cash for the crack cocaine. At trial, Officers Ward and Johnson testified that they observed this transaction and otherwise confirmed the substance of Ms. Knight's testimony.

The final transaction occurred on January 13, 1997, at the same location. At this purchase, Ms. Knight bought 0.6 grams of crack cocaine from the defendant and Ms. Key. Their conversation was as follows:

Ms. Knight: How much?

Defendant: . . . .

Ms. Knight: Well, damn, that don't look like it's good. You ain't dipped into it have you? What are you doing, Robin?

Willett (Key): . . . .

Ms. Knight: Is it any good?

Willett (Key): Richard said it is, so it must be.
Defendant: That ain't–ain't nothing wrong with it.

Ms. Knight: Huh?

Defendant: . . . .

Ms. Knight: Who are you looking for?

Defendant: I always look.

Ms. Knight: Always? I thought you was supposed to call me early.

Defendant: I did. Seven o'clock.

Ms. Knight: You didn't call me at no seven o'clock.

Defendant: Eight o'clock. Yeah, I did. And it kept ringing. Wasn't nobody there.

Ms. Knight: I must have been on the other line.

Defendant: Figured you was in bed.

Ms. Knight: No, I got up. I got up a little bit after . . . . Those others were–the rocks were bigger than these are.

Defendant: I know it.

Ms. Knight. Well, I don't mess with it. I just deliver. Well, I guess I better go. Huh?

Defendant: I get paranoid . . . .

Ms. Knight: Yeah, but, you ain't setting me up here are you? [Damn], you're looking around.

Defendant: Well, I got to. . . .

Ms. Knight testified that she purchased a total of 3.0 grams of crack cocaine from the defendant. She asserted that she had never used crack cocaine, but acknowledged that she was convicted of grand larceny in 1986.

At trial, the defendant testified that he and Ms. Key met Ms. Knight at a bar the day before the first transaction and that they later smoked crack cocaine together at a friend's residence. He claimed that Ms. Knight gave Ms. Key $300 on that evening to purchase more crack cocaine and that, in return for her efforts, Ms. Key was to receive some of what she would acquire. The defendant contended that neither he nor Ms. Key received any money on the day of the first transaction. He also claimed that Ms. Knight gave Ms. Key some of the crack cocaine for personal

use. The defendant insisted the he merely rode as a passenger with Ms. Key to each of the transactions and that he neither sold any of the drugs to the informant nor received any financial benefit from the sales. When asked about the content of the audio tapes, the defendant stated that he did not recall making many of the incriminating statements because he was "shooting coke."

Ms. Key also testified that she and the defendant first met Ms. Knight at a bar on the evening before their first meeting at the Food Country parking lot. She stated that she, Ms. Knight, and the defendant traveled together to a friend's residence and that she and Ms. Knight smoked crack cocaine together. Ms. Key testified that Ms. Knight gave her $300 that evening for the purchase of additional cocaine and that she attempted to procure more drugs for Ms. Knight, but was unsuccessful. When she returned, Ms. Knight had gone, so she arranged to meet with her on the following day in order to have additional time to find the drugs. Ms. Key claimed that she received no money from Ms. Knight at the first meeting at the Food Country parking lot and that, in fact, Ms. Knight gave her approximately $50 worth of the crack cocaine at that time. While she did remember meeting with Ms. Knight several times after the first cocaine sale, Ms. Key recalled no specifics about the other two transactions. She did acknowledge that she had pled guilty to three counts of the sale or delivery of crack cocaine and that she had received concurrent sentences of ten years on each count.

The defense also presented four witnesses to controvert Ms. Knight's testimony that she had never used crack cocaine. Ms. Knight's former husband, David Davis, testified that Ms. Knight used cocaine approximately two or three times per week during the course of their one-year marriage and that she smoked marijuana daily. He confirmed that she had a prior grand larceny conviction and described her as untrustworthy. Randy Harris, a friend of the defendant, testified that he had smoked crack cocaine with Ms. Knight, the defendant, and Ms. Key, and that he had observed Ms. Knight give Ms. Key money for the purchase of crack cocaine. Anthony Gudger testified that he had observed Ms. Knight smoke crack cocaine during the summer of 1998. Bobby Joe Moore claimed that he had previously smoked crack cocaine with Ms. Knight.

I

The defendant argues that the evidence was insufficient. Specifically, he contends that none of the police officers witnessed him exchange drugs or money with the confidential informant and insists that, "given the overwhelming testimony of the defense witnesses regarding the untruthfulness of the confidential informant's testimony, the evidence taken in the light most favorable to the State preponderates in favor of the innocence of the defendant."

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). In a criminal case, a conviction may be set aside only when the reviewing court finds that the "evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). A guilty

verdict, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves all conflicts in testimony in favor of the state's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). A verdict against the defendant removes the presumption of innocence and raises a presumption of guilt upon appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973).

The offense at issue is defined as follows:

> (a) It is an offense for a defendant to knowingly:
>
> * * *
>
> (2) Deliver a controlled substance; [or]
>
> (3) Sell a controlled substance
>
> * * *
>
> (c) A violation of subsection (a) with respect to:
>
> (1) Cocaine is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine and, in addition thereto, may be fined not more than one hundred thousand dollars ($100,000) . . . .

Tenn. Code Ann. § 39-17-417(a)(2)-(3), (c)(1).

Ms. Knight stated that the defendant telephoned her to arrange each of the three sales about which she testified. She stated that she dealt directly with the defendant during each transaction, going to the passenger side of the vehicle, which was occupied by the defendant, rather than to the driver's side, which was occupied by Ms. Key. The investigating officers confirmed that Ms. Knight approached the passenger side of the vehicle during each transaction, placing her hands inside the vehicle and returning with the illegal drugs and without the money that they had provided her. Each transaction was recorded on either audio or video tape which was played for the jury. The transcripts of the transaction establish that Ms. Knight dealt with the defendant. The defendant described how he acquired the cocaine and vouched for its quality. At one point, the defendant stated that "[i]t's five rocks, that's what I get for that much money."

The jury acted within its prerogative in accrediting the testimony of Ms. Knight and the officers and rejecting the defense theory. This court may not reweigh or reevaluate Ms. Knight's credibility. In our view, the evidence was sufficient.

II

Next, the defendant argues that the trial court erroneously sentenced him to the maximum term of 12 years on each count and erred by ordering him to serve each sentence consecutively.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

> [C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial

court only upon a determination that one or more of the following criteria[1] exist:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense," Tenn. Code Ann. § 40-35-102(1), and "no greater than that deserved" under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d

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[1] The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

785 (Tenn. Crim. App. 1991). The presumption of correctness is, however, "conditioned upon the affirmative showing in the record that the trial court considered sentencing principles and relevant facts and circumstances." Ashby, 823 S.W.2d at 169. The trial court must place on the record the reasons for the sentence. State v. Jones, 883 S.W.2d 597 (Tenn. 1994).

Here, the trial court observed as follows:

> [I]n imposing sentence for a Class B felony the presumptive sentence is at the middle of the range, so the presumptive sentence is ten years in each count . . . . So the court starts in this case with the presumption that the sentence will be ten years in each count.

The defendant argues, and the state concedes, that this statement of the law was erroneous. The proper starting point for determining the sentence for a Class B felony is the minimum sentence, rather than the mid-point of the range as the trial court stated. Here, the range of 8 to 12 years was applicable. The error requires a de novo review as to the length of the defendant's sentences.

At the conclusion of the sentencing hearing, the trial court determined that three enhancement factors were applicable:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
>
> (8) The defendant has a previous history of unwillingess to comply with the conditions of a sentence involving release in the community.

Tenn. Code Ann. § 40-35-114.

The defendant, age 37 and married at the time of his trial, attended West Greene High School in Mosheim where he completed the tenth grade. He earned his GED and took computer and paralegal courses while incarcerated at Riverbend. His last employment was as a saw operator in 1985.

The defendant's criminal record is lengthy, including prior convictions for felony evading arrest, multiple resisting arrests, multiple DUIs, assault, aggravated assault, possession of marijuana, possession of drug paraphernalia, escape, concealing stolen property, criminal trespass, disorderly conduct, petit larceny, battery, reckless driving, public intoxication, and disturbing the peace. Eight pages of the Department of Correction sentencing report were devoted to the defendant's prior criminal record. That enhancement factor has great weight. The application of Tenn. Code Ann. § 40-35-114(2) was also proper. The record demonstrates that the defendant orchestrated the three

illegal drug sales. He initiated contact with the drug task force's informant before each sale. The defendant negotiated the price of the cocaine with the informant and assured the quality of the cocaine. Because the defendant was a leader in the commission of the crime, this factor applies. The record also supports the trial court's application of Tenn. Code Ann. § 40-35-114(8). The defendant was on parole or probation when convicted of several of the offenses listed in the sentencing report.

The trial court did not find the presence of any mitigating factors. The defendant argues that the trial court erred by refusing to apply Tenn. Code Ann. § 40-35-113(1), that his conduct did not cause or threaten serious bodily injury. In rejecting that mitigating factor, the trial court stated that

> the sale of crack cocaine will not be said to not cause or threaten serious bodily injury because it does. We've all experienced . . . people that have suffered serious bodily injury or even death from the use of crack cocaine. It is a horribly dangerous drug to those that are addicted [to] it.

There has been some disagreement over the application of Tenn. Code Ann. § 40-35-113(1) to drug offenses. In State v. Marshall, 870 S.W.2d 532 (Tenn. Crim. App. 1993), this court concluded that the inherent nature of cocaine is not sufficient to support the application of the "high risk to human life" enhancement factor, see Tenn. Code Ann. § 40-35-114(10), where the General Assembly had already taken the nature of the drug into account when classifying it as a Schedule II controlled substance. In State v. Clyde Davis, No. 32 (Tenn. Crim. App., at Jackson, Jan. 23, 1991), a panel of this court concluded that the defendant, who was arrested with two packets of cocaine weighing 189.9 grams while operating his vehicle in Shelby County, did not threaten severe bodily injury. This court pointed out that the jury convicted the defendant of intent to sell based upon the amount of cocaine and noted that there was "absolutely no evidence . . . that the [defendant] sold cocaine to another person or was operating his motor vehicle under the influence of cocaine." Id.; see also State v. Michael Wayne Henry, No. 02C01-9611-CC-00382 (Tenn. Crim. App., at Jackson, May 29, 1997) (holding that the mitigating factor is applicable unless there is proof that the defendant is a major dealer or is involved in serious drug trafficking or the conduct relates to serious bodily injury). In State v. Johnny Ray Chrisman, No. 01C01-9211-CC-00361 (Tenn. Crim. App., at Nashville, Sept. 2, 1993), this court applied the mitigating factor because the state was unable to establish any threat of serious bodily injury.

However, in State v. Kenny Cheatham, No. 01C01-9506-CC-00196 (Tenn. Crim. App., at Nashville, June 11, 1996), this court held that the trial court did not err by refusing to apply Tenn. Code Ann. § 40-35-113(1) where the defendant was convicted of conspiracy to sell or deliver cocaine. In Johnny Arwood v. State, No. 335 (Tenn. Crim. App., at Knoxville, May 9, 1991), a sale of 2.5 grams of cocaine was held to have threatened serious bodily injury. In State v. Roger D. Pulley, No. 01C01-9501-CC-00013 (Tenn. Crim. App., at Nashville, Sept. 20, 1995), the trial court found the mitigating factor not applicable because of the large amounts of a dangerous drug.

In this case, the defendant sold the confidential informant 1.0, 1.4, and 0.6 grams of crack cocaine for a total amount of 3.0 grams. Because there was no indication that the sales involved a

particular or immediate threat of serious bodily harm, we conclude that the mitigating factor, even if given little weight, should have been applied in this case. The amount of drugs, while substantial, was not unusually large, especially when considered by the amount of each individual sale, rather than in the aggregate. Moreover, there was no proof in the record that the defendant was a major dealer involved in serious drug trafficking.

Given our conclusion that three enhancement factors apply and our determination that great weight should be placed on the defendant's lengthy criminal record, it is our view that the maximum sentence of 12 years is appropriate for each offense. While one mitigating factor should have been applied, its application does not serve to diminish the severity of the three significant enhancement factors. Thus, we affirm the maximum sentence of 12 years for each conviction.

The defendant also argues that the trial court erred by ordering him to serve each sentence consecutively. In considering consecutive sentencing, the trial court declined to find that the defendant was a professional criminal. The trial court stated as follows:

> Although . . . the state's proof would be that Mr. Norton was making income in this case from selling drugs and that he was unemployed, the state has not come forward and the burden is on the state to do that, to show professional criminal activity, more than just the fact that somebody was making money from drugs and that they were not employed. The state has a burden . . . to show the court that that was the only source or the major source of his livelihood.

Instead, the trial court imposed consecutive sentences based upon the defendant's extensive criminal record. In doing so, the trial court observed as follows:

> Without any question the [defendant's] record is extensive . . . . And, it is extensive to the extent that when you couple it with these charges that . . . I feel this court is in the position that the only decision that can be made is that they have to be consecutive under that category. So the effective sentence is 36 years. That is a sentence that is larger than often imposed in cases of this nature, but the enhancement factors, without question, take it [to] the maximum sentence. The extensiveness of the sentence, without any question, demands the consecutive imposition thereof.

As previously stated, the record indicates that the defendant was arrested after a third controlled buy. In the first sale, the confidential informant purchased 1.0 grams of crack cocaine from the defendant. In the second, the sale involved 1.4 grams. In the third, the informant purchased 0.6 grams, for a total of 3.0 grams.

This court addressed a similar issue in State v. John Derrick Martin, No. 01C01-9502-CR-00043 (Tenn. Crim. App., at Nashville, Dec. 19, 1995), aff'd and remanded on other grounds, 940

S.W.2d 567 (Tenn. 1997); see also State v. Thornton, 10 S.W.3d 229, 244 (Tenn. Crim. App. 1999). In Martin, the defendant was arrested after four sales of cocaine to undercover agents in an aggregate amount of 13 ounces. He was convicted at trial as follows:

> Counts One, Two, and Three: sale of cocaine, ten year sentences on each count;
>
> Count Four: possession of cocaine with intent to sell, ten year sentence;
>
> Count Five: possession of drug paraphernalia, six month sentence;
>
> Count Six: driving on a suspended license, three month sentence.

The trial court imposed consecutive sentences for each conviction after finding that Martin was a professional criminal and that he committed the offense while on probation. The panel concluded that while Martin did qualify as a professional criminal and did in fact commit the offenses while on probation, the imposition of consecutive sentences was inappropriate because "the severity of the crimes could vary significantly depending upon the specific number of buys the officers chose to conduct and the amounts purchased in each buy." Furthermore, the panel ruled "that forty years for the drug offenses is [not] reasonably related to the severity of these four crimes." Id. at 9. Martin's sentence was modified so that "the two ten-year sentences on similar counts one and two will run concurrently with each other and concurrently with all of the other counts including the two misdemeanor offenses." The remaining sentences were ordered to be served consecutively. The defendant's original sentence of forty years was thereby reduced to twenty years and nine months.

Based upon the rationale of Martin, the imposition of three consecutive sentences in this case was excessive. Certainly, the police could have arrested the defendant after the first, or, at least, the second controlled purchase. As in Martin, the imposition of three consecutive sentences would permit investigating officers to dictate the length of a sentence based upon the number of controlled buys they arranged and the amounts purchased. It is also worth noting that the defendant's accomplice received an effective ten-year sentence for the same offenses.

The trial court acknowledged that the effective sentence was "larger than that often imposed in cases of this nature." Yet it concluded that a 36-year term was required due to the enhancement factors and the need for consecutive sentencing. In State v. Marshall, 888 S.W.2d 786 (Tenn. Crim. App. 1994), this court authorized trial courts to consider the combination of sentence enhancement and consecutive sentencing as a means of achieving the principles and purposes of the Sentencing Reform Act of 1989. Id. at 788. In Lane, our supreme court, while considering the appropriateness of a consecutive sentence, confirmed that sentences "must be 'justly deserved in relation to the seriousness of the offense' and 'should be no greater than deserved for the offense committed.'" 3 S.W.3d at 460 (quoting Tenn. Code Ann. §§ 40-35-102(1), -103(2). The record here does not demonstrate that the trial court considered these sentencing principles in determining that the

circumstances warranted consecutive sentences. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In our view, a more appropriate sentence, and one which is more closely related to the controlled nature of the crimes, would be to require the defendant to serve two, rather than all three, of his sentences consecutively, thereby reducing the defendant's effective sentence from 36 years to 24 years. This sentence takes into account the nature of the offenses and the defendant's prior criminal background, and is also "justly deserved in relation to the seriousness of the offenses," Tenn. Code Ann. § 40-35-102(1), and is "no greater than that deserved" under the circumstances, Tenn. Code Ann. § 40-35-103(2).

Accordingly, the defendant's convictions are affirmed and his effective sentence is modified from 36 years to 24.

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GARY R. WADE, PRESIDING JUDGE